No.88-844

Supreme Court, U.S.
FILED
MAR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WILLARD G. CHRISMAN
Appellant

v.

THE TIMES MIRROR COMPANY
Appellee

On Appeal From The California Court of Appeal, Fourth Appellate District Division One

APPELLANT'S REPLY BRIEF

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QUESTIONS PRESENTED

The questions presented by this reply to the motion to dismiss are:

1. Where the Appellant raised in the trial court, before the appellate court, and in the California Supreme Court the issue of the constitutionality of the retraction statute, the application of the Soldiers' & Sailors' Civil Relief Act, and the scope of the privileges to be accorded to the press, under California Civil Code § 47(4) and federa law, and where the California courts' implicity upheld the constitutionality of the California statutes, and expanded the scope of the press' privilege under the First Amendment, were the federal questions presented by this appeal adequately raised so that the matter is within this court's appellate jurisdiction under 28 U.S.C. § 1257(2)?

2. If this court determines that there is no jurisdiction by appeal, because appellant's arguments and the issues raised

before the California courts concern the unconstitutionality of a retraction statute, the application and scope of the neutral reportage and literary license doctrines, and the extent to which a person defamed by the press may be deprived of his right to protect his reputation where there is evidence that the press acted with actual malice, is this case appropriate for the exercise of this court's jurisdiction by writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

STATEMENT OF THE CASE

Appellant Willard G. Chrisman ("Chrisman") filed his libel action in May 1985. On July 25, 1986, appellee Times-Mirror Co., publisher of the L.A. Times ("the Times") moved for summary judgment. On October 20, 1986, Chrisman filed his Opposition, and in subsequent briefs, challenged the use of the retraction statute, the burden of proof imposed on him, and the scope of the privileges claimed by the Times, including on constitutional grounds.[1/]

On June 26, 1987, the trial court denied the Times' motion for summary judgment, finding that neither the California retraction statute, Civil Code §48a ("48a"), nor the privilege available to the press for neutral reporting on court proceedings set forth in California Civil Code §47(4) (47(4)a), nor federal constitutional law, warranted granting the Times' motion.

The Times sought review of the trial

court's ruling by petition for writ of mandamus. Chrisman opposed the petition, arguing that the trial court correctly ruled that whether the Times' conduct caused him injury and special damages, based on the record before it, presented factual questions for the jury; that as a matter of law the articles published concerning his court-martial trial were not privileged because they were not "fair and true" as required by § 47(4) and not privileged under federal law.[3/]

On September 27, 1987, the Court of Appeal denied the Times' petition. The Times then petitioned the California Supreme Court to review this decision. In his Answer to the petition, filed October 21, 1987, Chrisman contended (at pp. 25-29) that the Times' conduct was not absolutely privileged under the federal constitution. The Supreme Court directed the Court of Appeal to hear the matter on November 12, 1987. In his second response to the peti-

tion filed December 7, 1987 (at pp. 5, 7-11, 13-16, 19-25), Chrisman contended that § 48a was unconstitutional, and unconstitutional as applied because he was and is a private figure and there was evidence of actual malice; he also raised the constitutional issues as to whether or not applying § 47(4) to deprive him of a trial on the merits given the evidence of actual malice as to the defamatory allegations made in the Times' reports of his court-martial was constitutional.

On May 9, 1988, the Court of Appeal entered its opinion directing the trial court to enter summary judgment for the Times. The clear import of this decision, was to uphold §§48a and 47(4) and to expand the scope of the neutral reportage and literary license doctrines despite Chrisman's challenge that they were repugnant to the constitution.

On May 23, 1988, Chrisman filed his Petition for Rehearing in the Court of

Appeal.[3/] On June 17, 1988, Chrisman filed his Petition for Review in the California Supreme Court. He again claimed that the retraction statute was unconstitutional on its face and its application unconstitutional because it imposed an improper burden of proof upon him. He also asserted that the failure of the Times to truthfully and fairly report on the court-martial proceedings abrogated the 47(4) privilege. The Supreme Court denied the Petition.

In sum, the trial and appellate courts of California, Chrisman raised the constitutional issues he now requests this court consider and claimed that the statutes at issue herein, and their application under the circumstances, was unconstitutional.

SUMMARY OF ARGUMENT

Although the California Court of Appeal did not expressly address Chrisman's constitutional claims, the appellate court necessarily upheld the constitutionality of the retraction statute, §48a, and the priv-

ilege statute, 47(4), despite Chrisman's status as a private individual, the evidence of actual malice, and the qualified nature of the privilege accorded to the press when reporting on judicial proceedings. Appellate jurisdiction therefore exists.

Should this court conclude that there is no appellate jurisdiction, this court can and should conclude that it has certiorari jurisdiction because important constitutional questions concerning California's retraction statute, the privileges available to the press when its articles are not "hot news," where evidence of actual malice exists, and the scope of the neutral reportage and literary license doctrines have been raised, which are ripe for review.

I.

THIS APPEAL IS WITHIN THIS COURT'S APPELLATE JURISDICTION.

A. Appellant Challenged the Constitutionality of the California Retraction Statute.

The Times asserts that no substantial

federal questions or challenges to the validity of the retraction statute, §48a, were properly before the California courts. This is not so.[4/]

The trial court determined the retraction statute did not act as a bar to Chrisman's libel claims premised on those articles for which no retraction demand was made.[5/] Thereafter, before the Court of Appeal and the Supreme Court, Chrisman contended that "§48a, which limited him to special damages, was unconstitutional and denied him due process and equal protection where the accusations made were not "hot news," there was clear and convincing evidence of defendant's actual malice, defendants did not offer evidence to contest plaintiff's status as a private figure, and the accusations were libelous on their face." As in First English Evan. Luth. Church v. Los Angeles County 107 S.Ct. 2378 (1987) and Pruneyard Shopping Center v. Robins 447 U.S. 74 (1980), the California

Court of Appeal, by rejecting plaintiff's claim that he was entitled to have a jury determine whether his constitutional rights were violated (here, the issue was whether or not he was libeled by the publication of the May 20, 1984 article, which lead to his removal from command of his ship before the Navy reopened its investigation and instituted court-martial proceedings), made a final determination of the federal issue.

The Times nevertheless contends the arguments made by Chrisman throughout the lower court proceedings were insufficient to preserve the federal question stating: "California law is controlling on whether a federal question was properly preserved in the California courts," citing John v. Paullin 231 U.S. 583 (1913) (Appellee Brief, p. 8). The Times' contention is without merit. As this court recognized in Street v. New York 394 U.S. 576 (1969) at 583:

> The issue whether a federal question was sufficiently and properly raised in the state court is itself

ultimately a federal question, as to which this court is not bound by the decision of the state court.

As in Street v. New York, even though the California Court of Appeal did not mention the constitutionality of §48a, it is apparent that the unconstitutionality of §48a was necessarily decided when the Court of Appeal directed entry of summary judgment for the Times.[6]/

The Times, in support of this contention, which flies in the face of the Street decision cited above, cites several cases, none of which is controlling. [7]/ In Richmond Newspapers, Inc. v. Virginia 448 U.S. 555 (1980), this court noted that "appellant never explicitly challenged the statute's validity."[8]/ In the present case, Chrisman repeatedly challenged §48a's validity.

In Rohr Aircraft Corp. v. County of San Diego 362 U.S. 628 (1960), this court, relying on precedent, declined to exercise appellate jurisdiction: "an attack upon a

tax assessment or levy on the ground that it infringes a taxpayer's federal rights does not sustain an appeal." In the present case, there is no issue concerning a tax levy.

In Kulko v. Superior Court of California 436 U.S. 84 (1978), relying again on precedent (concerning its jurisdiction when of a state's in personam jurisdiction statute is at issue), this court declined to exercise appellate jurisdiction; it treated the papers as a petition for certiorari. This case patently does not and did not present a jurisdictional issue; rather the constitutionality of § 48a.[9/]

In sum, the cases appellee relies on are inapposite, whereas recent cases concerning the First Amendment, its scope, and the limitations is imposed upon the press, support a determination that, under the circumstances presented herein, where a state statute has been challenged as uncon-

stitutionally depriving appellant of rights guaranteed to him, the exercise of this court's appellate jurisdication is appropriate. See, Pruneyard Shopping Center v. Robbins, supra; Cox Broadcasting Corp. v. Cohn 420 U.S. 469 (1975); Philadelphia Newspapers, Inc. v. Hepps 106 S.Ct. 1558 (1986).

In a case argued before this case in January, Oring v. California State Bar (No. 87-1224), this court determined, in June 1988, that it had appellate jurisdication to determine the constitutionality of the California State Bar's presumption that testimonial advertising is inherently misleading and thus unethical. The presumption imposed a burden on the appellant which he contended was either unconstitutional or had been met. The present case presents a situation analogous to that before this court in Oring. The California statute at issue, 48a, limits a recognized constitutional right to recover for damages

to personal reputation and to business reputation. Whether the limitation is constitutional is an issue which was implicity determined by the Court of Appeal, and thus the constitutionality of § 48a is an issue appropriately determined by this court on appeal.

B. Appellant Presented and Preserved the Federal Question as to the Constitutionality of the Literary License Doctrine as Applied in the Present Case.

The Times, in its trial court and appellate briefs, contended that its reports on the court-martial were "absolutely privileged" under the "literary license doctrine" enunciated by the federal courts. Chrisman, at all times, admitted that the federal courts had recognized that a fair and true report of a judicial proceeding was a part of the First Amendment privilege accorded the press, but asserted that its application under the circumstances, where the reports on the court-martial were grossly distorted and biased and neither fair nor true, was improper.[10/]

The result of the appellate decision was the creation of absolute privilege where none exists, contrary to this court's repeated admonitions that a private individual's good name is to be protected. Philadelphia Newspapers, Inc. v. Hepps 106 S.Ct. 1558 (1986) dis. opn. by J. Stevens at p. 1566, and that repetition of a falsehood about a public official or figure does not release the press from responsibility if made with reckless disregard for the facts. St. Amant v. Thompson 390 U.S. 727, 732 (1968); New York Times Co. v. Sullivan 376 U.S. 254, 278 (1964). The press cannot repeat the accusations of others, whether or not made in judicial proceedings unless its reporting is "neutral," "impartial" and not misleading. Dorr v. United States 195 U.S. 138 (1903).

THIS CASE RAISES SUBSTANTIAL FEDERAL QUESTIONS WHICH WARRANT THE EXERCISE OF THIS COURT'S CERTIORARI

Chrisman contended that the courts

were required to determine whether or not he was a public figure.[11/] He also argued that there was clear and convincing evidence the Times, in republishing the unfounded accusations of Navy personnel without investigation, and repeating those allegations in its reports of the court-martial, and editing its presentation of the court-martial testimony so as to exclude any report on the testimony of defense witnesses and all testimony favorable to him by prosecution witnesses, acted with malice. The claims made by Chrisman were rejected by both the California Court of Appeal and Supreme Court not expressly, but by implication.[12/] The effect of the courts' rulings was to deprive Chrisman of a constitutional right, recognized by this court since it seminal cases: New York Times v. Sullivan, supra, Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974), and thereafter in Time, Inc. v. Firestone 424 U.S. 448 (1976), the right to the protec-

tion of his good name.[13/] The Court of Appeal, by premising its decision to grant the appellee's motion for summary judgment on the retraction statute and the privilege accorded a fair and true report of judicial proceedings, without consideration of the constitutional issues raised by its determination to employ these statutes to bar the presentation of Chrisman's libel claims to a jury, determined adversely to Chrisman the federal issues before it.[14/] As in Calder v. Jones 465 U.S. 783 (1984) and Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 105 S.Ct. 2939 (1985), this court can and should find if appellate jurisdiction is absent, this case warrants issuance of a writ of certiorari.

CONCLUSION

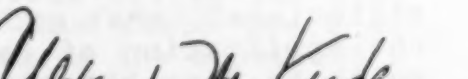
Although the Court of Appeal declined to expressly decide the federal issues Chrisman raised, it did so by implication, ruling in favor of the challenged statutes. It thereby deprived appellant of his con-

stitutional right to a jury trial, even where he presented clear and convincing evidence that if he was deemed a public official or public figure, the press acted with actual malice. The decision of the California Court of Appeal is in conflict with this court's precedent and the decisions of the federal courts. Accordingly, this court can and should exercise its appellate jurisdiction. Alternatively, Chrisman respectfully requests this court treat this appeal as a petition for writ of certiorari and grant the same.

Respectfully submitted,

Dated: March 2, 1989

COPPO & COSGROVE

By: 
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AMK:gvb[3.9]

[1]To refute the contention of the Times that Chrisman failed to raise the constitutional issues before the trial, the appellate court, and the Supreme Court, Chrisman hereby lodges with this Reply copies of his Opposition to the motion for summary judgment (filed 10/20/86) and his Supplemental Opposition to defendant's motion for summary judgment along with his Supplemental Declaration regarding the Soldiers & Sailors Civil Relief Act; his Answer to petition for review (filed 10/21/87); and the Petition for Rehearing (filed 5/23/88), which were not described in the Times-Mirror's fn. 6 nor lodged with this court.

[2]In this brief before the Court of Appeal (pp. 35-37), Chrisman argued that his case differed from St. Amant v. Thomas 390 U.S. 727 (1968) in that the issue of malice was not addressed by the Times; he asserted that the Times' conduct was substantially more egregious than that of the defendant in St. Amant, and that the Times' reporting went beyond permissible "literary license" as that doctrine is enunciated by the federal courts.

[3]In this petition, he argued that on its face the retraction statute was unconstitutional, that under the circumstances, the application of the retraction statute so as to deny him a jury trial was violative of the equal protection and due process clauses of the Fourteenth Amendment, and that by calling the L.A. Times' gross distortions permissible editing the court improperly expanded the scope of the press' First Amendment privilege.

[4]In Street v. New York 394 U.S. 576, (1969), the appellant did not explicitly challenge the constitutionality of the statute before the trial court, but asserted deprivation of a fundamental right. This was held sufficient. Here, although Chris-

man did not challenge the constitutionality of the retraction statute in the trial court, he did assert deprivation of his fundamental right.

[5]The Times acknowledges that Chrisman asserted that the trial court should not grant the Times' motion for summary judgment because of his status as a member of the military and the Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. App. 501 et seq., ("Soldiers Act"). Chrisman also raised at the appellate level his claim that he was entitled to protection under the Soldiers Act. The Times' argument, premised on a limited application of the Soldiers' Act finds no support in the record or case law. The statute is to be liberally construed in favor of soldiers and sailors, Pleshar v. United States 227 F.2d 624, 628 (9th Cir. 1955) affd. 352 U.S. 202 (1956) and its purpose is to suspend legal proceedings and "transactions relating thereto." Modern Industrial Bank v. Grossman 40 N.Y.S. 2d 628 (1943). A member of the armed services need not show that he was handicapped from asserting his claims (Bickford v. United States 656 F.2d 636 (Ct. of Claims 1981), although Chrisman did so.

[6]In Staub v. City of Baxley 355 U.S. 313 (1958), as here, the state Court of Appeal declined to pass on the appellant's contention that the statute at issue was unconstitutional. This court concluded it was within its province to inquire as to whether or not the appellant's federal right was "denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support." In the present case, the appellate court was presented with factual and legal grounds for concluding that §48a impermissibly limits the recovery of damages from the press, and under the circumstances imposed unwarranted burdens on

Chrisman and abridged rights guaranteed under the constitution. The court ignored issues which this court has previously held must be determined: (1) the status of an individual (private or public figure); and (2) evidence of actual malice, in ruling that summary judgment was mandated. In doing so, the court denied, in substance and effect, Chrisman's federal rights.

[7] In Street v. New York, supra, at pp. 584-585, citing New York ex rel. v. Bryant v. Zimmerman 278 U.S. 63, 67 (1928), this court noted there are various ways in which the validity of a state statute may be drawn in question on the grounds that it is repugnant to the constitution of the United States: "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time and if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

[8] In Richmond Newspapers, Inc. v. Virginia, this court, although it concluded that it did not have jurisdiction by appeal, determined to treat the matter as a petition for certiorari pursuant to 28 U.S.C. 2103, and granted the petition, apparently on the basis that the rights guaranteed under the First and Fourteenth Amendments were of paramount importance and the issues ought to be decided by the court.

[9] If this court rejects appellant's claim that it has appellate jurisdiction, in light of the admission by the Times' editor Dale Fetherling that the initial article was not "hot news," and the California courts' recognition that the retraction statute was not intended to protect

publishers where the publisher has an opportunity to investigate the story before publication. (Burnett v. National Enquirer 144 Cal.App.3d 991 (1983) app. dism. 465 U.S. 1014), appellant requests that this appeal be considered for writ of certiorari; the case presents an opportunity to decide an issue of importance to both the press and the public.

[10] See, for example, pp. 35-37 of Chrisman's Opposition to Petition for Writs of Mandamus, Prohibition & Review lodged with this court by appellee.

[11] In New York Times v. Sullivan, this court left open the question of "how far down" into the lower ranks of government employees the "public official" designation extends. 376 U.S. at 254, fn. 23.

[12] As the court recognized in Super Tire Engineering Co. v. McCorkle 550 F.2d 903 (3d Cir. 1977) cert. den. 434 U.S. 827, rehrg. den. 434 U.S. 1025, federal rights are denied not only by an erroneous decision concerning federal rights, but also by a refusal of the state court to explicitly determine the issue. Where a federal question is raised, and a state court decides the federal right by upholding state law, the state court by limiting its decision does not defeat federal review.

[13] The Times, relying on Paul v. Davis 424 U.S. 693 (1976) suggests that this court has not recognized a right to reputation. See, Brief, fn. 10, pp. 20-21. This footnote exemplifies why this court should conclude, if it does not have appellate jurisdiction, that it will treat this matter as a petition for certiorari and grant the same. This case presents several issues of importance, as has been discussed. But, fundamentally, the issue which has been briefed in the courts below, which is presented by this appeal, and which

merits consideration by this court, is the extent to which this court is willing to evicerate its prior rulings which establish an individual's right to protect his reputation, and which set the parameters and framework which govern the assertion and protection of this right by an individual who has been defamed by the press.

[14] Appellee's contention at p. 13, that the decision below does not conflict with the decisions of other state courts or federal courts of appeal, is erroneous. See, for example, Schiavone Const. Co. v. Time, Inc. 735 F.2d 94 (2d Cir. 1984); Goldwater v. Ginzberg 414 F.2d 324 (2d Cir. 1969) cert.den. 396 U.S. 1049; Westmoreland v. CBS, Inc. 596 F.Supp. 1170 (S.D.N.Y. 1984).